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SUPREME COURT, U.S.
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No. 04-819

In The
Supreme Court of the United States

SWIFT-ECKRICH, INC., DOING BUSINESS AS CONAGRA REFRIGERATED FOODS,

Cross-Petitioner,

v.

UNITHERM FOOD SYSTEMS, INC.,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN REPLY TO OPPOSITION

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1. UNITHERM HAS NO ANTITRUST STANDING.

The antitrust claims should have been dismissed once the Federal Circuit Court of Appeals concluded that Unitherm Food Systems, Inc. ("Unitherm") had "failed to present any facts that could allow a reasonable jury to accept . . . its demonstration of antitrust injury." (App. A, 44a.) Proof of antitrust injury was needed not only to persuade the jury of injury to Unitherm – the proof was also needed to demonstrate ***to the court*** that there was antitrust ***standing*** so as to permit the case to go to the jury. Without standing there was no jurisdiction, and without jurisdiction the jury verdict had no meaning. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 101 (1998).

Unitherm's statement at the opening page of its Opposition that "ConAgra quarrels with the Federal Circuit's factual determinations" is very wrong. ConAgra's Cross-Petition is based on the failure of the Federal Circuit to follow through and apply the law to its determination that Unitherm did not prove standing. Unitherm unequivocally agrees that the Federal Circuit found the failure to prove antitrust injury: "In its review of the sufficiency of the evidence, the Federal Circuit concluded that Unitherm's proof of antitrust *injury* was insufficient." (Opp., p. 5, emphasis in original.)

With little regard for the need to prove antitrust standing, Unitherm argues without authority that section 4 of the Sherman Act has "unlimited scope," and it concedes only that limited classes of persons lack standing (e.g., "creditors and lessors of the injured entity"). (Opp., p. 2.) However, the universe of parties who have standing is far more limited than Unitherm asserts because "the antitrust laws . . . were intended for the protection of

competition, not competitors." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 (1986), (emphasis in original) quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1976).

Given the most fundamental, undisputable facts of this case, it was inevitable that Unitherm would fail to demonstrate standing: it sells food processing equipment, while ConAgra sells food.[1] Indeed, the only argument that Unitherm can muster in favor of standing was based on the supposed existence of a market for browning processes. Unitherm's own expert witness, however, conceded that neither Unitherm nor anyone else has ever "sold" such a process, which led the Federal Circuit to conclude that the evidence "could not sustain the narrow market . . . that Unitherm pleads as a relevant antitrust market." (App. A, 48a.)

Unitherm asserts that its antitrust injury was its own "lost sales," bolstered by sales supposedly lost by other equipment manufacturers which, like Unitherm, were ***not*** ConAgra competitors. Yet Unitherm ignores completely the fact that it was compensated for this non-antitrust injury under Oklahoma tort law. The jury measured Unitherm's damages as $2,000,000, which were doubled under Oklahoma law, and Unitherm was awarded $4,000,000 on that basis. ConAgra does not challenge this award. This is not a case of an injured party that is not

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[1] Unitherm argues that it must have standing because it "fits precisely within the holding [Unitherm does not say *what* holding] of *Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172 (1965)." That case, however, provides little assistance to Unitherm, as the *Walker Process* parties were competitors in the sale of food processing equipment, and the issue of standing was never raised.

compensated. Unitherm is a party that has been doubly compensated, but wants more based on a bogus and unsupportable antitrust claim.

The precise error of law that caused this case to be remanded was the Federal Circuit's determination of standing based on the ***allegations of the pleadings*** rather than the ***evidence***. (App. A, 44a.) In effect, the Federal Circuit held that Unitherm could (and did) establish standing by merely alleging it. Its conclusion was tantamount to finding that jurisdiction exists because it is alleged, even though the evidence is to the contrary.

In its efforts to overcome (or obfuscate) the error by the Federal Circuit, Unitherm misconstrues this Court's earlier precedents. (Opp., p. 4, n.9.) *Cargill*, 479 U.S. at 111; *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 521, 545-46 (1983). These cases do not suggest that allegations alone can establish standing where proof to support the allegations is lacking. They merely confirm that proper allegations of standing are needed to prevent a ***dismissal before the plaintiff has presented its evidence***. They do not hold that a party can continue to rely on mere allegations of standing after it has tried and failed to prove standing.[2]

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[2] The District Court's denial of ConAgra's motion for summary judgment based on lack of standing did not, as Unitherm suggests (Opp., p. 3), relieve it from having to ***prove*** standing by competent evidence. Even if we were to assume for the sake of argument that the Federal Circuit had not found against Unitherm based on its review of the evidence, denial of summary judgment certainly did not amount to a determination that Unitherm did, in fact, have standing.

In *Cargill,* reversing the lower courts' denial of dismissal for lack of standing, this Court pointed to the absence of *evidence* in the record, rather than relying on allegations in the pleadings. It rejected, for example, the plaintiff's assertion that "evidence in the record" supported a theory of predatory pricing. "This evidence . . . consists only of four passing references, three in deposition testimony, to the possibility that Excel's prices might dip below costs." *Id.* at 119. In *Associated Contractors,* a different posture altogether was presented. Dismissal was sought based on the pleadings ***before*** any evidence was in. Under those circumstances, the Court looked to the adequacy of the pleadings.

Of course, sufficient allegations alone cannot ensure that a plaintiff will survive a standing challenge because, in the end, the allegations must be followed by ***proof***. In other words, allegations are necessary but not sufficient. The Federal Circuit's reliance on allegations alone deprives the standing requirement of any real meaning. All a party needs to do, according to the Federal Circuit, is allege standing without regard to the evidence or the facts. Unitherm cites no precedent, and we know of none, in which a party was ultimately allowed to rely on mere allegations to satisfy the standing requirement after the evidence had been presented.

Unitherm is wrong when it argues that ConAgra's Cross-Petition does not present a proper and important issue for review by this Court. (Opp., p. 1.) If the Federal Circuit decision is allowed to stand, it will be a clear precedent for determining antitrust standing based on the pleadings alone, without regard for the evidence.

2. RULE 50(B) DOES NOT APPLY AND SHOULD NOT BE INTERPRETED TO REQUIRE A REDUNDANT POST-JUDGMENT MOTION TO PRESERVE REVIEW.

The threshold ***procedural*** question[3] presented by this Cross-Petition is not the interpretation of Fed.R.Civ.P. 50, but whether the rule applies here at all. Rule 50 does not apply to determinations of standing, which are not jury determinations. If Rule 50 were intended to apply here, it would not begin with the words "If during a trial by jury. . . . " Unitherm does not address at all the question of whether Rule 50 has any application to a determination of antitrust standing, so apparently it agrees that the rule does not apply.

However, even if the Court were to agree that antitrust standing presents a question that is subject to Rule 50, the Court nevertheless should rule that a redundant post-judgment motion[4] is not a prerequisite to appellate

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[3] Unitherm has completely lost sight of the fact that the error here arose out of a *procedural* question. (Opp., pp. 6-8.) This is apparent in its discussion of the facts underlying the *merits* of the *Brunswick* and *Cargill* cases, e.g., that *Brunswick* involved bowling centers, not turkeys.

[4] Notwithstanding Unitherm's assertion, further review of ConAgra's *pre-verdict* Rule 50(a) motion is inappropriate because that motion was not made part of the questions presented in the Petition or the Cross-Petition. The Federal Circuit was satisfied that ConAgra had adequately preserved review of antitrust injury and standing, and its ruling on this issue thus ends the matter. (App. A, 42a ["ConAgra challenges on appeal, ***as it did below***, Unitherm's standing to bring its antitrust claim"].) Unitherm's selective citations to the appellate record paints a distorted picture, at best. Unitherm does not mention, for example, that ConAgra had filed pre-trial briefing on antitrust injury and standing, and that Judge Cauthron, in ruling on ConAgra's Rule

(Continued on following page)

review. Fed.R.Civ.P. 50(b) does not contain any suggestion that error is waived by failure to make the duplicate motion that it permits. It is a fair and reasonable assumption that if this rule were intended to call for the forfeiture of a substantial right because a litigant did not make its motion a second time, it would explicitly so state.

Other rules governing trial and appellate proceedings provide us with examples of such forfeiture language. For example, Fed.R.Evid. 103(a) describes the procedure for preserving an error ***and the consequence of the failure to abide by the procedure***:

> ***Error may not be predicated*** upon a ruling which admits or excludes evidence . . . unless a substantial right of the party is affected, and (1) . . . [i]n case the ruling is one admitting evidence, ***a timely objection or motion to strike appears of record***, stating the specific ground of objection, if the specific ground was not apparent from the context. . . .

(Emphasis added.) Similarly, Fed.R.App.P. 3(a)(1) states the mandatory procedure for taking appeal:

> An appeal permitted by law as of right from a district court to a court of appeals may be taken ***only by filing a notice of appeal*** with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant ***must*** furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

50(a) motion, acknowledged that she understood ConAgra's position and was not inclined to allow counsel to argue the point again.

Rule 50(b) stands in stark contrast. Even after numerous revisions, that rule does not mention "error," "appeal," or "review." It does not say that a post-judgment motion is the "only" means of preserving error, or that a motion "must" be made at peril of forfeiting appellate review. Unitherm argues that there must be "strict compliance 'with the procedural requirements of Rule 50(b),'" but all that the rule does is set forth a time limit for making post-verdict motions. The only forfeiture that can be inferred is the forfeiture of the right to make a post-trial motion, not the right to appellate review of a motion previously made under Rule 50(a).

This Court, in *Cone, Johnson,* and *Globe Liquor*,[5] held that a post-verdict renewal of a ***pre-verdict*** challenge was a prerequisite to an appellate court's power to direct a verdict based on insufficient evidence. Unitherm now urges the Court to go a step further and hold that in the absence of a ***post-verdict*** motion, the appellate court may not even remand for a new trial. Neither of these unstated requirements would serve the interests of judicial economy or fairness.

This Court noted in *Cone* that a post-judgment motion gives the trial judge a "last chance" to exercise his or her discretion to choose whether to direct a verdict or order a new trial.

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the

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[5] *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948).

> judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. [Citations.] Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded "a last chance to correct his own errors without the delay, expense or other hardships of an appeal." [Citations.]

Id. at 216.

However, exactly the same can be said for the trial court's review of a Rule 50(a) pre-verdict motion. There is no benefit to having the same trial judge rule on the same motion twice, and there is, therefore, no reason to require a second motion.

Unitherm does not even attempt to explain why it should be necessary for a litigant to avail itself of *Cone's* "last chance" in *every* case. Tellingly, it does not explain why this particular case would have been better positioned for appeal had ConAgra renewed post-judgment its challenge to antitrust injury and standing. Well before Judge Cauthron ever "saw and heard the witnesses" at trial, she had already ruled on Unitherm's antitrust standing in the context of a summary judgment motion, and she had already read and considered ConAgra's pre-trial briefing of the issue. Nothing happened at the trial that changed the standing issue. She made very clear that she understood ConAgra's position and did not want to have more argument on the point. Renewal of the motion post-judgment would have been a futile act that only would have delayed the appeal and increased legal fees. Any decision to call for

and consider written briefs after the evidence has been presented, whether the post-evidence motion is made once under Rule 50(a) or twice under Rules 50(a) and 50(b), falls squarely within the sound discretion of trial judges to properly and expeditiously manage the cases before them.

Revisitation of the Court's earlier precedents is warranted, given the absence of explicit guidance in Rule 50(b) itself and the unwarranted forfeiture of rights that, in some circuits, results from a failure to comply with purely procedural "requirements" that do not appear in the rule. ConAgra submits that trial judges should not be forced, by imagined requirements that cannot be found in the rule, to hear redundant motions that are not helpful, and are instead made formalistically to preserve rights on appeal. This Court should clarify that Rule 50(b) does not require a post-judgment renewal of a pre-verdict motion under Rule 50(a) to preserve error based on sufficiency of the evidence, and in the absence of such second motion, an appellate court may direct verdict or remand for new trial where sufficient evidence is lacking.

Respectfully submitted,

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